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IN THE

Supreme Court of the United States

October Term, 1946 — No. 372

In the Matter of Proving the Last Will and Testament of
HENRY ALTMAYER, Deceased,
as a Will of Real and Personal Property.

EMIL H. WASSERBERGER,
Petitioner,

vs.

BEATRICE ALTMAYER RODNEY,
Respondent,

and

DONALD T. MULLANE,
Special Guardian.

SPECIAL GUARDIAN'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Donald T. Mullane, Special Guardian of Nanette Barbara Rodney, a person interested herein but under the laws of the State of New York not a distributee of the above named decedent, respectfully shows to this Honorable Court as and for his reply to the Petition for

Writ of Certiorari to the Surrogate Court, New York County, State of New York.

1. That he was duly appointed the Special Guardian of Nanette Barbara Rodney by the Surrogate's Court of the County of New York, State of New York. (Record page 28).

2. There is submitted herewith to this Court an analysis of the record in the hope that it may be helpful to this Court in deciding the petition now pending before this Honorable Court for a Writ of Certiorari to the Surrogate's Court, New York County, State of New York.

ANALYSIS OF RECORD

The Parties and Their Interests

Emil H. Wasserberger, the petitioner here, is a co-executor named in the propounded instrument (fol. 60). He is the attorney who drew the instrument and who supervised its execution (fols. 778, 124-125). He is not named as a legatee in the Will.

The respondent here, Beatrice Altmayer Rodney, is the only daughter of the deceased (fol. 315). In the Will she is named as the principal legatee (fols. 57-58). The decedent died a widower, and in case of intestacy she is the sole distributee (fols. 756-768).

The Special Guardian appears on behalf of Nanette Barbara Rodney, the only grandchild of the decedent, the daughter of the objectant, Beatrice Altmayer Rodney (fol. 316). In the Will a trust fund of approximately one-third of the estate was created for her benefit (fols. 50-53). In the event of intestacy, she will receive nothing.

The value of the estate at the time of decedent's death was placed at approximately Two Hundred Thousand Dollars ($200,000.00) (fol. 45).

The Instrument Propounded

The propounded document is a carbon copy of an original (fol. 24).

Its documentary scheme is as follows:

Beatrice Altmayer Rodney, the decedent's daughter, is the principal legatee, receiving outright approximately two-thirds of the Estate (fols. 57-58). Nanette Barbara Rodney, the decedent's only granddaughter, is the beneficiary of a trust fund of approximately one-third of the estate, which trust fund is to continue until she attains the age of twenty-eight, at which time the remaining principal will be paid to her outright, but in the event of her earlier death the principal is to go to her mother (fol. 52). Rose Stern, a niece of the decedent, is the beneficiary of a bequest of Two Thousand Dollars ($2,000.00), as is the Federation for the Support of Jewish Philanthropic Societies of New York City (fols. 49-50).

The Pleadings

Emil H. Wasserberger, the proponent below and petitioner here, offered a carbon copy of a Will dated May 1, 1937, alleging that the original was in existence at the time of the death of the deceased, or was fraudulently destroyed during his lifetime (fols. 22-23, 34).

Beatrice Altmayer Rodney, the objectant below and respondent here, answered, denying those paragraphs of the petition that related to the continued existence of the Will and its fraudulent destruction, and alleged that the instrument was revoked by the decedent during his lifetime (fols. 70, 71).

Facts

The deceased executed a Will on May 1, 1937 (fols. 778-779). The Will was drawn by the petitioner here, Emil Wasserberger, who also supervised its execution by the deceased in the presence of the subscribing witnesses and the respondent here, at Mr. Wasserberger's office (fols. 125-126). The Will was on that date delivered to the decedent, who, in the presence of witnesses, stated that he would deposit the Will in his safe deposit box (fols. 132; 277-278). Thereafter, the decedent stated that he had deposited the Will in the box (fol. 133).

The decedent, at that time and up to the time of his death, had a safe deposit box in the Manufacturers Trust Company. The decedent and the objectant each had access to the box. The decedent was bedridden from sometime in October, 1943 to his death on February 1, 1944 (fols. 780-781; 336-338; 403-404). During this period the objectant was the only one who had access to the box (fols. 348, 781), and she actually did visit it during this latter period (fol. 345).

The petitioner here testified that in March of 1940, he reviewed the Will, and that he discussed with respondent here the fact that through oversight the Will, as prepared, did not provide that the Trustees would not be required to furnish security. He advised her that he thought this should be remedied, and suggested a codicil to the Will to take care of this. He prepared a draft and sent it to her, as requested, but never received any reply from her (fols. 146-153).

The petitioner here testified that on January 6, 1944 the respondent here told him that she had seen the Will in the safe deposit box that morning, but that she had not had a chance to read it and asked if the proponent had a copy. He showed her the conformed copy offered for probate, which she read without comment (fols. 171-174).

Emil H. Wasserberger, the petitioner here, also testified that he saw the respondent here about three or four days later, at which time she asked if a copy of the Will could be probated if the original was not produced; and he advised her that he believed it could if there were no objections. He inquired of her why she asked, to which Beatrice Altmayer Rodney replied that the Will was "entirely outmoded." When asked by him at this point if the Will was not in the safe deposit box, she replied, "I don't know. I don't know. I will have to see" (fols. 177-179).

He further testified that he saw her again on January 21, 1944 (fols. 180-182), and called her on the telephone on February 1, 1944 (fols. 183-185), the evening of her father's death; that he saw her at the funeral parlor on February 2, 1944, at which time he told her that it was time for him to prepare some papers, to which she replied:

> "I will come to your office in a few days to discuss matters with you and get things straightened out, but for the present I have the funeral on my hands" (fols. 185-186).

Finally, he testified, that not hearing from the objectant for about a week he tried to reach her by telephone at home and at her father's place of business, without success, leaving messages at each place asking that she get in touch with him; that she failed to do so; that he finally reached her by telephone on February 10, 1944, at which time he told her that he was preparing a petition for probate and a petition for an order to open the deceased's safe deposit box, in order to get the Will, and that he needed certain information. She gave him part of the information, and then asked him why he wanted it, to which he replied:

> "Well, as I just explained to you, I have to get an order to open the vault in order to take out the will.";

at which point she advised him:

> "The Will is not in the box. The man died intestate" (fols. 187-190).

Part of respondent Beatrice Altmayer Rodney's deposition was read into the record. She also testified in her own behalf. She admits that she examined the contents of the safe deposit box between the latter part of October, 1943 and the first of February, 1944 (fol. 350). She admits having had a conversation with proponent at his office in January, 1944, at which time they discussed her father's Will. Her version of the conversation was as follows:

> "Mr. Wasserberger said, 'Rod, I suppose this Will—you have access to your father's safety deposit box. I suppose the Will is in the box,' and I answered, 'Ask me no questions and I will tell you no lies.' Whereupon, Mr. Wasserberger reached down in the desk drawer and produced a copy of the Will, laid it on his desk, and said, 'Well, Rod, shall we offer this for probate, although the Court does not look with favor upon it?' And I answered, 'My father is still pretty much alive'" (fols. 362-363; see also fols. 663-664).

She denied having any further conversation with proponent at his office concerning the Will, but admits meeting him and having telephone conversations with him immediately prior and subsequent to her father's death. Her version of the telephone conversation between them about ten days after the death of her father is substantially the same as proponent's (fols. 393-395).

Respondent Rodney testified that she consulted another attorney on February 2, 1944, the day after her father's death and before he was buried (fols. 763-764). On February 5, 1944 she signed and verified a petition for probate, in which she stated:

> "That your petitioner has made diligent search and inquiry for a Will of said Deceased and has not found any such Will, nor has your petitioner obtained any information concerning any such Will" (fol. 850).

Objectant (respondent here) produced evidence through the witness, Kelekian, to the effect that the Will had been revoked by the testator in the summer of 1939. The objectant did not testify as to the revocation, because of the limitation of Section 347 of the Civil Practice Act (fols. 332-335), but Kelekian did testify that she was present at the time (fol. 532). She admits, however, that she did not advise the proponent of the destruction of the Will at the time they discussed it in his office in January, 1944, or during any of her subsequent meetings or conversations with him (fols. 442-444).

The Surrogate ignored Kelekian's testimony (fols. 808-813), and the Appellate Division found it,

> "not only highly improbable in itself but wholly inconsistent with and in direct conflict with, the conduct of contestant in the period preceding and immediately following the death of the testator (fol. 1063).

The rest of the testimony adduced at the trial was of little or no value in determining the issues of this case. For example, the proponent petitioner here sought to show a strong bond of affection between the decedent and his granddaughter (fols. 137-138; 249-250), while the objectant respondent Rodney here sought to show that his

feelings toward her were cold and undemonstrative (fols. 462-464); but neither side was able to show any change in his feelings toward her from the time the Will was executed in 1937 to the date it was allegedly revoked in 1939, or to the date of his death in 1944. If his feelings toward her were warm or cold, they were the same throughout and were strong enough to induce him to execute a Will leaving her one-third of a sizable estate (fols. 50-53).

In support of the petition, some proof was presented of declarations of the deceased near the time of his death, to the effect that his affairs were in order and that he had a Will (fols. 196-199; 243-244; 261-262). The Surrogate found these "of doubtful admissibility but in any case were of no probative value" (fol. 811). The Appellate Division apparently ignored this testimony in arriving at its decision (fols. 835-847; 1061-1063).

The Surrogate, "While agreeing with the proponent that the speech and conduct of the daughter leave her open to grave suspicion," decided that he could not

> "find in the proof enough to warrant a finding that the Will was actually in deceased's safe deposit box after a date when deceased became bedridden or a finding that the will was in existence when deceased died or a finding that it had been fraudulently destroyed in deceased's lifetime,"

and therefore denied the petition for probate (fols. 812-813).

The Appellate Division unanimously reversed this decision and found,

(1) That after its execution, decedent's Will dated and duly executed May 1, 1937, was placed in a safe deposit box in the Manufacturers Trust Company, subject to the joint control of the deceased and the contestant;

(2) That this Will remained in this safe deposit box up to at least the early part of January, 1944;

(3) That for several months prior to his death on February 1, 1944, deceased was bedridden, and that after the date when deceased became bedridden the only person who had access to the safe deposit box where the Will had been placed, was the contestant;

(4) That the original of the Will was not destroyed by decedent; that this Will was in existence when decedent died, or had been fraudulently destroyed in deceased's lifetime (fols. 846-847).

Beatrice Altmayer Rodney, respondent herein, then appealed to the Court of Appeals of the State of New York. The Court of Appeals in its decision reversed the order of the Appellate Division and affirmed the decree of the Surrogate's Court of New York County, with costs in the Court of Appeals and in the Appellate Division upon the ground that the findings of the Surrogate are in accordance with the weight of the evidence. (Record page 359).

Emil H. Wasserberger, the petitioner herein, then moved in the Court of Appeals of the State of New York for an order granting re-argument of the appeal herein.

Upon such re-argument, it was argued that the Court of Appeals had denied Emil H. Wasserberger, as respondent, equal protection of the laws of the State of New York; that the Court of Appeals had denied and abridged the rights, privileges and immunities and the due process of law secured to respondent Emil H. Wasserberger, petitioner herein, by Section 1, of the 14th Amendment of the Constitution of the United States, and by Article 1, Sections 1 and 6 of the Constitution of the State of New York; that the Court of Appeals had failed to decide the question of law as to the issue of revocation of the will

which was necessary to the determination of the litigation; that the Court of Appeals failed to discharge its primary duty and function of reviewing the question of law presented upon the appeal.

It was also argued that even though reversal were indicated, a new trial should have been granted.

The Court of Appeals in its decision on said motion, denied the same with costs and necessary disbursements. (Record pages 362-363).

It is from this decision that petitioner herein seeks a Writ of Certiorari from this Court to the Surrogate's Court of New York County, State of New York.

Special Guardian's Position on this Petition for Writ of Certiorari

The Special Guardian's ward, Nanette Barbara Rodney, at the time of the trial before the Surrogate's Court of New York County, was eighteen years of age. She is now twenty years of age and will be twenty-one years of age on February 28th, 1947.

On the trial before the Surrogate's Court of New York County, against the wishes of the undersigned, Nanette Barbara Rodney took the stand and testified against her own interests in this proceeding and in behalf of her mother, Beatrice Altmayer Rodney, respondent herein (fols. 459-518).

The undersigned Special Guardian felt that a factual issue was raised upon the trial.

In the Surrogate's Court of New York County, State of New York, he urged that the respondent here, Beatrice Altmayer Rodney, had not borne the burden of proving revocation and asked that the copy of the propounded instrument be admitted to probate.

In the face of the determination by the Surrogate's Court of New York County of what in the opinion of the

Special Guardian was purely a factual situation, the Special Guardian did not appeal from the Surrogate's decision denying probate.

On the appeal to the Appellate Division of the Supreme Court of the State of New York, the undersigned as Special Guardian of Nanette Barbara Rodney, submitted an impartial analysis of the testimony in the belief that it might be helpful to that Court in deciding the appeal.

As indicated in the record, and in this reply, the Appellate Division of the Supreme Court of the State of New York reversed the Surrogate's Court and awarded the undersigned as Special Guardian, although he did not appeal, costs. (Record pages 354-355).

In the Court of Appeals of the State of New York the undersigned as Special Guardian, argued and submitted a brief asking that the decision of the Appellate Division be affirmed.

As indicated *supra* the Court of Appeals of the State of New York reversed the order of the Appellate Division and reaffirmed the order of the Surrogate. (Record page 359).

The undersigned Special Guardian has read the brief of Edward B. Wolchok, Esq., attorney for the petitioner herein, submitted in support of the petition for Writ of Certiorari from this Honorable Court. While the undersigned Special Guardian cannot in his own mind see that any constitutional question is involved herein, nevertheless in view of the fact that it would be to his ward's interest to have the propounded document admitted to probate, he does not oppose this petition.

Respectfully submitted,

DONALD T. MULLANE,
Special Guardian for Nanette Barbara Rodney, appearing *pro se*.